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ABSTRACT

This manual provides guidance to Idaho school districts in identifying students with serious emotional disturbance (SED), as defined by federal and state laws and regulations. Sections 1, 2, and 3 of the guide describe SED in the context of various factors, including the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act, and state regulations. Sections 4 and 5 identify the components contained in the federal regulation on SED, describe how each of these components has been defined by hearing officers and courts, and give examples of how students have met particular components of the federal regulation on SED. Section 6 discusses schizophrenia, the only condition which automatically qualifies a student as having SED. Sections 7, 8, and 9 provide information on particularly contentious topics within a discussion of SED, including social maladjustment, conduct disorder, and mental disorders. Sections 10 and 11 present case studies showing how the components of the federal regulation on SED, school officials, parents, hearing officers, and courts interact in determining whether a student has met the federal definition of SED. The guide cites federal policy letters and refers to case law from various courts around the nation. (CR)

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STUDENTS WITH SERIOUS EMOTIONAL DISTURBANCE

A Legal Guide to Identification

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STUDENTS WITH SERIOUS EMOTIONAL DISTURBANCE

A Legal Guide to Identification

This document was developed jointly by Elaine Eberharter-Maki, the Western Regional Resource Center, Eugene, Oregon, and the Idaho Department of Education pursuant to Grant No. H028A30003 with the U.S. Department of Education, Office of Special Education and Rehabilitative Services. However, the opinions expressed herein do not necessarily reflect the position or policy of the U.S. Department of Education, and no endorsement of the U.S. Department of Education should be inferred.

SED

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TABLE OF CONTENTS

Preface ... v

About the Author ... 1

I. SED in Context ... 3

Introduction ... 3

SED as a Disability ... 3

Section 504 ... 4

Definitions ... 5

Determining SED Criteria ... 5

Individuals Involved in SED Identification ... 6

Importance of Documentation ... 6

Precedence ... 7

II. Federal Law Requirements ... 9

III. State Law Requirements ... 11

IV. The Five Essential Contingencies of SED ... 13

1 What is "a condition"? ... 13

2 What constitutes "one or more of the following characteristics"? ... 14

3 What is "a long period of time"? ... 14

4 What is "a marked degree"? ... 15

5 How is "adversely affects a child's educational performance" defined? ... 16

V. SED Characteristics Defined 19

1 What does it mean for a student to have "an inability to learn that cannot be explained by intellectual, sensory, or health factors"? 19

2 What does it mean for a student to have "an inability to build or maintain satisfactory interpersonal relationships with peers and teachers"? 20

3 What does it mean for a student to have "inappropriate types of behavior or feelings under normal circumstances"? 21

4 What does it mean for a student to have "a general pervasive mood of unhappiness or depression"? 21

5 What does it mean for a student to have "a tendency to develop physical symptoms or fears associated with personal or school problems"? 22

VI. Schizophrenia and SED 23

VII. Social Maladjustment vs. SED 25

A Case Study
In the matter of the Education of S.S. and Lake Oswego Sch. Dist. 26

VIII. Conduct Disorder vs. SED 29

Conduct Disorder as a Psychiatric Disorder under DSM-IV 29

Psychiatric Disorders and IDEA Eligibility 29

Conduct Disorder vs. Social Maladjustment 31

A Course of Action 31

Cases Involving Conduct Disorder and Other Disorders held to be SED 32

Cases Involving Conduct Disorder and Other Disorders held not to be SED 32

A Case Study
Capistrano Unified Sch. Dist. v. Wartenberg 33

IX. DSM-IV Mental Disorders vs. SED 37

Biologically-Based Brain Diseases 37

Addiction to Drugs and/or Alcohol 38

Conduct Disorder 39

Depression 39

Attention Deficient Disorder (ADD)/Attention Deficient Hyperactivity Disorder (ADHD) 39

X. Five Case Studies: Behavior/emotional problems held to be SED 41

Case Study One
M.R. by R.R. v. Lincolnwood Bd. of Educ. 41

Case Study Two
Laughlin III v. Central Bucks Sch. Dist. 42

Case Study Three
Lapides v. Coto 43

Case Study Four
Dallas Sch. Dist. v. Richard C. 43

Case Study Five
Sarah W. v. Independent Sch. Dist. of Boise City 44

XI. Five Case Studies: Behavior/emotional problems held *not* to be SED 47

Case Study One
A.E. Evans v. Independent Sch. Dist. No. 25 47

Case Study Two
Doe v. Bd. of Educ. of the State of Connecticut 47

Case Study Three
Doe v. Sequoia Union High Sch. Dist. 48

Case Study Four
In re Kristina Louise C. 48

Case Study Five
Palo Alto Unified Sch Dist 50

Conclusion 51

"Serious emotional disturbance is not an easy term to precisely define and there is more than one set of parameters that could be set for its application."

—Office of Special Education Programs
Letter to Conway

PREFACE

Students identified as *seriously emotionally disturbed* qualify for special education and related services under the Individuals with Disabilities Education Act (IDEA) if it is determined they are in need of such educational services. Multi-Disciplinary Teams and Child Study Teams share the difficult responsibility for determining whether a student has met the federal definition of seriously emotionally disturbed (SED).

The problems involved in identifying students as SED are multiple. These problems stem from the ambiguity inherent in the federal definition of SED, which has led to diverse interpretations of the definition by Hearing Officers and courts. Even the Office for Special Education Programs (OSEP) has acknowledged the problematic nature of the term *serious emotional disturbance*, stating: "[s]erious emotional disturbance is not an easy term to precisely define and there is more than one set of parameters that could be set for its application."[1] Determining whether a student has met the definition of SED is further complicated by the fact that many students under review suffer from numerous ailments and disorders—all of which must be considered in the review process.

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[1] *Letter to Conway*, EHLR 213:153, 153 (OSEP 1988).

This manual, *Students with Serious Emotional Disturbance: A Legal Guide to Identification*, provides guidance to Idaho school districts with regard to identifying students who are SED, as defined by federal and state laws, and regulations. Given the federal definition of SED, which is open to considerable interpretation, and the variety and number of ailments that must be considered, often for a single student, SED classification may be a difficult task. The *Guide to Identification* offers assistance in several ways:

1. Sections I, II, and III describe SED in the context of various factors, including the IDEA, Section 504, and state regulations;

2. Sections IV and V identify the components contained in the federal regulation on SED, describe how each of these components has been defined by Hearing Officers and courts, and give examples of how students have met particular components of the federal regulation on SED;

3. Section VI discusses schizophrenia—the only condition which automatically qualifies a student as SED;

4. Sections VII, VIII, and IX provide information on particularly contentious topics within a discussion of SED, including "social maladjustment," "conduct disorder," and "mental disorders";

5. Sections X and XI present case studies showing how the components of the federal regulation on SED, Multi-Disciplinary Teams and Child Study Teams, other school officials, parents, Hearing Officers, and courts interact in determining whether a student has met the federal definition of SED.

In determining SED classification, Multi-Disciplinary Teams and Child Study Teams should evaluate a particular student in terms of *each* of the components listed in Sections IV, V, and VI of this manual.

Many interpretations of laws and regulations pertaining to SED come from Hearing Officers' decisions. It should be remembered that Hearing Officers' decisions are from administrative proceedings and do not set or have precedence. However, the language in such decisions may be helpful in interpreting similar situations.

In addition to providing Hearing Officers' Interpretations, the *Guide to Identification* cites policy letters from the United States Department of Education and refers to case law from various courts around the nation. Of the twelve case studies described in this manual, only one has direct precedence in Idaho, *Capistrano Unified Sch. Dist. v. Wartenberg*. Another case, *Sarah W. v. Independent Sch. Dist. of Boise City*, will have direct precedence in Idaho once the case has been decided by the U.S. District Court in Idaho.

The *Guide to Identification* also includes definitions from the *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, (DSM-IV) and references to the *Idaho Special Education Implementation Manual*.

ABOUT THE AUTHOR

Elaine Eberharter-Maki is an attorney practicing in the area of education law in Boise, Idaho. She represents school districts in Idaho and handles most of the special education work for these districts. Elaine provides consulting services to school districts and conducts training on a variety of education law issues. Prior to going into private practice, she was the Deputy Attorney General assigned to the Idaho State Department of Education from 1988 to 1995.

Elaine is the author of *The Educator's Guide: Student Discipline in Idaho* and also authors two newsletters dealing exclusively with education law, *The Summary* and *Special Ed News*. She teaches graduate-level courses in education law and special education law at the University of Idaho, Boise Center.

I. SED IN CONTEXT

Introduction

The complexity of Serious Emotional Disturbance (SED) makes it impossible to establish a one-size-fits-all checklist on how to identify students as SED. Decisions from hearing officers and court cases, however, call attention to persistent themes associated with identifying SED students:

1. Each student must be evaluated on a case-by-case basis, as all other students are, to determine if the definition of SED has been met;

2. Students who do not qualify under the category SED for special education and related services may qualify for such services under another disability category or Section 504;

3. Even students who exhibit a range of conditions do not automatically qualify as SED, nor do such conditions automatically disqualify a student from receiving special education and related services under the category of SED;

4. With the exception of students diagnosed with schizophrenia, all students must meet the five contingencies defined in the federal regulation to qualify as SED.

Attention to these considerations may help the educator focus on addressing the needs of students within legal boundaries.

SED as a Disability

Serious emotional disturbance (SED) is one of 13 categories of disabilities under the Individuals with Disabilities Education Act (IDEA).[2]

Students qualifying for special education and related services under the IDEA are entitled to a program that is at no cost to the parents and that is under public supervision or direction. The program for each student must be tailored to fit his/her individual needs. Programs must be offered to students three years of age through the semester they turn 21 years at the preschool, elementary, and secondary levels of education.[3]

Special education is defined as specially designed instruction that meets the unique needs of a student with

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[2] 34 C.F.R 300.7(a)(1) (1995) (The 13 categories of disabilities are: (1) autism; (2) deaf-blindness; (3) deafness; (4) hearing impairment; (5) mental retardation; (6) multiple disabilities; (7) orthopedic impairment; (8) other health impairment; (9) serious emotional disturbance; (10) specific learning disability; (11) speech or language impairment; (12) traumatic brain injury; (13) visual impairment including blindness.)

[3] A school may be ordered to provide compensatory education to a student beyond the semester he/she turns 21 if the school has previously failed to provide a Free Appropriate Public Education to that student. *Johnson v. Bismarck Pub. Sch. Dist.*, 949 F.2d 1000 (8th Cir. 1991); *M.C. v. Central Regional Sch. Dist.*, 23 IDELR 1181 (3rd Cir. 1996).

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disabilities. Related services include an array of items such as transportation, counseling services, parent counseling and training, psychological services, physical and occupational therapy, to name just a few.[4]

Although special education encompasses more than academic performance, federal law does not require a school district to treat a student's emotional disturbance, nor does it require a particular approach in providing educational services.[5] Federal law also does not require a school district to provide services outside of educational support services.[6]

Section 504

Under Section 504 of the Rehabilitation Act of 1973 (Section 504), no qualified individual with a disability shall, on the basis of the disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives benefits from federal financial assistance.[7] While the IDEA deals only with students with disabilities, Section 504 is far broader and covers *all* individuals dealing with public schools, including students, employees, parents, and patrons. However, regarding the discussion of SED, only students are at issue.

Although the IDEA provides some federal financial assistance to school districts for the purpose of providing special education and related services to students who qualify under the act, Section 504 does not provide additional funding. Rather, public schools receiving or benefiting from federal financial assistance must provide Section 504 services without additional funding.

A student is entitled to the protections of Section 504 if he/she has a physical or mental impairment that substantially limits one or more major life activities. A major life activity is defined as any one of the following: caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, *learning*, and working.[8] Because Section 504 uses a broad definition of the term "disability," a student need not be disabled in the area of learning to be considered disabled under Section 504.

If a student qualifies as disabled under Section 504, the school district must provide the student with a Free Appropriate Public Education (FAPE). *The definition of FAPE under Section 504 is different from the definition of FAPE under the IDEA*. Under Section 504, FAPE is defined as the provision of regular or special education and related aids and services that are designed to

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[4] 34 C.F.R. § 300.16 (1995).

[5] *Hampton County Pub. Sch.*, 20 IDELR 579 (SEA Va. 1993).

[6] *In re Child with a Disability*, 21 IDELR 753 (SEA Conn. 1994) (The request for a mentor to show a student how to act socially in the community and how to manage his time was denied, since such services are outside the realm of the IDEA.)

[7] 34 C.F.R. § 104.4(a) (1995).

[8] 34 C.F.R. § 104.3 (1995).

meet the individual educational needs of students with disabilities as adequately as the needs of nondisabled students."

FAPE, under Section 504, includes residential placement for a student if placement in a public or private residential program is necessary because of the student's disability.[9] Residential placement includes room and board plus non-medical care and must be provided at no cost to the student or his/her parents or guardian.[10]

Definitions

It is important to recognize that the *clinical* definition of an emotional disturbance is different from the *special education* definition of SED. "Thus, a child may suffer from an emotional disturbance clinically, but not suffer from such educationally so as to be eligible for special education."[12] The federal regulation does not state the difference between clinical emotional disturbance and that required for eligibility under the IDEA; consequentially, the term "seriously emotionally disturbed" has invited considerable interpretation by hearing officers and courts.

In 1985, a congressionally-mandated study investigated the possible impact of a change in the federal definition of SED. As a result of this study, the Office of Special Education Programs (OSEP) determined that no changes should be made to the definition of SED.[13] Since the terminology in the federal regulation has not been further defined by OSEP, it is helpful to consider court decisions and hearing officer decisions for guidance.

Determining SED Criteria

Individual states have the authority to provide operational definitions and interpretations of specific features set forth in the federal SED regulation, but the interpretation must not conflict with the federal IDEA regulation.[14]

The Idaho State Department of Education developed the *Idaho Special Education Implementation Manual* as a guideline and regulatory document. The *Implementation Manual* includes, among other things, guidance on SED. School districts in Idaho are required either to adopt the *Implementation Manual* or to maintain a similar document approved by the Idaho State Department of Education.

This manual, *Students with Serious Emotional Disturbance: A Legal Guide to Identification*, incorporates material from the *Implementation Manual* and draws on other sources as well.

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[9] 34 C.F.R. § 104.33 (1995).

[10] 34 C.F.R. § 104.33(c)(3) (1995).

[11] *Id.*

[12] *Fauquier County Pub. Sch.*, 20 IDELR 579, 583 (SEA Va. 1993).

[13] *Letter to Comcar*, EHLR 213:153 (OSEP 1988).

[14] 34 C.F.R. pt. 300 (1995); *Schrag Letter*, EHLR 213:247 (OSEP 1989).

Individuals Involved in SED Identification

A Multi-Disciplinary Team (MDT)[15] formed at the school level serves as an assessment and evaluation team that determines whether a referral of a student for special education has merit. In dealing with students suspected of being SED, a school psychologist is typically involved and administers many of the evaluation procedures. A school psychologist and other school professionals are qualified for their positions if they are: 1) properly licensed or certified; and 2) meet the "highest requirements in the State applicable to the profession or discipline in which a person is providing special education or related services."[16]

The results of evaluations and tests, along with any private evaluations that may exist, are considered by the MDT. The law does not grant one MDT member's opinion more weight than another's; rather, it is a *team* decision regarding the recommendation pertaining to special education eligibility that is forwarded to the Child Study Team (CST).[17]

The findings and recommendations of the MDT are submitted to the CST for its determination of whether a particular student has a disability, and if so, what special education and related services should be provided to that student. If the CST determines that a student has a disability and *needs* special education, an Individualized Education Program (IEP)[18] is developed for the student.

Importance of Documentation

The more documentation a school has regarding the identification, evaluation, and provision of Free Appropriate Public Education (FAPE) to disabled students, the better off the school is. Appropriate documentation may be needed at some time to convince a hearing officer or a court that a school's provision of FAPE, or its refusal to provide special education and related services regarding a particular student, was justified. The more detailed the documentation, the easier it will be for schools to defend their actions.

Through clear and complete documentation, a school can ensure that a student is properly classified as

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[15] An MDT must include: 1) a teacher or other specialist who is knowledgeable in the area of SED; 2) persons appropriately certified or licensed and specifically trained in the use and administration of SED evaluation materials and procedures; 3) the student's general education teacher. The MDT may include the parent/guardian, but such participation is *not required*. IDAHO STATE DEPARTMENT OF EDUCATION & IDAHO ASSOCIATION OF SPECIAL EDUCATION ADMINISTRATORS, IDAHO SPECIAL EDUCATION IMPLEMENTATION MANUAL III-4 (Sept. 1993) [hereinafter ID. DEPT. OF ED., IDAHO SPECIAL EDUCATION IMPLEMENTATION MANUAL].

[16] 34 C.F.R. § 300.153(a)(2) (1995); *see also Letter to Todd*, 22 IDELR 634 (OSEP 1995).

[17] The CST must be comprised of: 1) the student's teacher; 2) one or both of the student's parents or the student's guardian; 3) the student, if appropriate; 4) other individuals at the discretion of the parent/guardian or the school district. 34 C.F.R. § 300.344 (1995).

[18] 34 C.F.R. § 300.346 (1995).

eligible/ineligible under the IDEA for special education and related services, and thus will not have to contend with the loss of funds for erroneous classification of eligibility.[19]

Precedence

Not all cases cited in this guide have precedence[20] in Idaho. The three federal courts that have direct precedence in Idaho are the U.S. District Court in Idaho, the Ninth U.S. Circuit Court of Appeals, and the United States Supreme Court.[21] Cases reported from other federal courts may be reviewed for guidance, but there is no obligation that their rulings be followed in Idaho.

In the state court system, Idaho has seven judicial districts. Decisions from one judicial district do not have precedence in another district. However, decisions from the Idaho Supreme Court and the Idaho Court of Appeals do have precedence and must be followed by all judicial districts.

Administrative hearing officer decisions do not have precedence, but may be helpful in interpreting a particular situation.

United States Department of Education guidance letters from the Office of Special Education and Rehabilitative Services (OSERS) and the Office of Special Education Programs (OSEP) are interpretive rules.[22] Failure to comply with guidance letters may result in potential financial sanctions on states and school districts.[23]

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[19] 34 C.F.R. § 300.141 (1995).

[20] "Precedent" is defined as "[a]n adjudged case or decision of a court, considered as furnishing an example or authority for an identical or similar case afterwards arising or a similar question of law." BLACK'S LAW DICTIONARY 1176 (6th ed. 1990).

[21] The *writ of certiorari* is a discretionary device used by the U.S. Supreme Court to choose the cases it wishes to hear. BLACK'S LAW DICTIONARY 1609 (6th ed. 1990).

[22] *Metropolitan Sch. Dist. v. Davila*, 969 F.2d 485, 490 (7th Cir. 1992) (An "interpretive rule" is exempt from the Administrative Procedure Act requirements of notice and comment procedures. It provides an interpretation as to what the administrative officer thinks the statute or rule means. "Interpretive rules, although they are entitled to deference, do not bind reviewing courts.").

[23] *Virginia Dept. of Educ. v. Riley*, 23 F.3d 80 (4th Cir. 1994).

II. FEDERAL LAW REQUIREMENTS

The Individuals with Disabilities Education Act (IDEA)[24] defines the term "children with disabilities" as children with "serious emotional disturbance . . . who, by reason thereof, need special education and related services."[25] Under the IDEA, if a student does not need special education, then he/she is not entitled to related services.[26] Broader in scope than the IDEA, Section 504 of the Rehabilitation Act of 1973[27] defines appropriate education as consisting of *special or regular education* and related services.[28] Students identified as SED who do not qualify for related services under the IDEA may qualify for such services under Section 504.

The federal IDEA regulation, as opposed to the Act, states that "the term 'children with disabilities' means those children evaluated . . . as having . . . serious emotional disturbance . . . and who because of those impairments need special education and related services."[29] The requirements that a student 1) have a disability *and* 2) need special education in order to be eligible for services under the IDEA apply to all 13 disability categories—including the category of SED.[30] This two-part test has been interpreted by one hearing officer as a legislative attempt to define the category of SED in less restrictive terms; the test precludes the idea that a student be in the "most serious states of emotional distress" before qualifying for services under the IDEA.[31] Conversely, another

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[24] 20 U.S.C. ch. 33 §§ 1400-1485 (1990-1994); *id.* § 1491 (1994); 34 C.F.R. pt. 300 (1995).

[25] 20 U.S.C. § 1401(a) (1994).

[26] *West Chester Area Sch. Dist.*, 18 IDELR 802, 803-804 (SEA Pa. 1992)

> [T]he evidence is overwhelming from experts on both sides that Melissa [the student] needs the related service of individual therapy in order to attain and maintain regular attendance, but there is no showing at all that she needs special education in terms of personalized instructional intervention. . . . Related services are not required for every child but rather are required only if necessary for the child to benefit from special education [footnotes omitted].

[27] 20 U.S.C. § 1405 (1975); 29 U.S.C. § 794 (1994); 34 C.F.R. pt. 104 (1995).

[28] 34 C.F.R. pt. 104 (1995); *West Chester Area Sch. Dist.*, 18 IDELR 802 (SEA Pa. 1992).

[29] 34 C.F.R. § 300.7(a)(1) (1995).

[30] *Id.*

[31] *Edward A.F. v. Clint Independent Sch. Dist.*, 1986-87 EHLR DEC. 508:204, 211 (SEA Tex. 1986)

> [The school district] overly emphasized the fact that the federal criteria prefaced the phrase "emotionally disturbed" with the word "seriously."
>
> . . . in order for Edward [the student] to qualify for coding as emotionally disturbed, he must exhibit bizarre and dangerous behavior, be detached from reality, and not be able to control

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hearing officer held that SED "requires a finding of an absolute inability" to learn on behalf of a student.[32]

his conduct or behavior . . . it is ludicrous to proffer that the authors of the federal or state criteria intended such a restrictive eligibility threshold.

> The common criteria is simply that the condition, once established, be such that it "adversely affects educational performance."
>
> . . . [T]he same two-part test for eligibility is carried throughout the federal criteria in reference to all other listed handicapping conditions. First, the handicapping condition is generally defined or described. Second, eligibility is conditioned on a showing that the condition "adversely affects educational performance." It would make no sense whatsoever to assume that the legislators intended to qualify all other handicapping conditions on a standard of averse effect on educational performance while restricting admission as emotional disturbed to only those in the most serious states of emotional distress.

Id. at 210-211.

[32] *Henry County Bd. of Educ.*, 22 IDELR 761, 763 (SEA Ala. 1995).

[33] 34 C.F.R. § 300.7(b)(9) (1995).

Federal Regulation for SED

"Serious emotional disturbance" is defined as follows:

(i) The term means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance—

(A) An inability to learn that cannot be explained by intellectual, sensory, or health factors;

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;

(C) Inappropriate types of behavior or feelings under normal circumstances;

(D) A general pervasive mood of unhappiness or depression; or

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) The term includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have a serious emotional disturbance.[33]

III. STATE LAW REQUIREMENTS

Idaho law states that "'[c]hildren with disabilities'" include "children with . . . serious emotional disturbance."[34] The 112 school districts in Idaho are responsible for providing special education and related services to children with disabilities beginning at age three and continuing through the semester of school in which the student turns 21 years.[35] Presently, the definition of SED by state rule is identical to the federal regulation with one exception: the state rule defines SED as "[a] condition in which *the following characteristics* [A through E in the federal regulation] are exhibited over a long period of time and to a marked degree which adversely affect educational performance."[36] (Emphasis added.) The Idaho rule can be read to require *all five* of the characteristics listed in the federal regulation to be present before a student qualifies as SED. The federal regulation setting forth the definition of SED "only requires a finding of *one* of these five criteria for a child to qualify as seriously emotionally disturbed."[37] (Emphasis added.)

The state rules covering public education are in the process of being extensively rewritten. The current rules will be obsolete after April 1, 1997.[38] The proposed changes to the state special education rules defer to the IDEA for definitions. If the proposed changes are adopted by the Idaho State Board of Education, as is anticipated, the *Idaho Special Education Implementation Manual* will be amended to reflect those changes. School districts that have adopted the *Implementation Manual* as policy will also need to adopt parallel changes.

Conflicts between federal and state regulations must be resolved in such a manner that gives precedence to the federal language, since states can pass laws that provide for greater protections than those offered by federal laws, but cannot provide for fewer protections than federal laws.[39]

Federal laws can also preempt state constitutional provisions. The Idaho Supreme Court has recently held that the IDEA "was enacted 'in pursuance' of the United States Constitution" and thus the

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[34] IDAHO CODE § 33-2001 (1991).

[35] IDAHO CODE § 33-201 (1996), *id.* § 33-2002 (1993).

[36] IDAPA 08.02.05.240.02.v. (May 17, 1993).

[37] *Lapides v. Coto*, 1987-88 EHLR DEC 559:387, 390 (N.D. Cal. 1988).

[38] HB 473, effective Feb. 7, 1996.

[39] *Letter to Pinkney*, 23 IDELR 893, 894 (OSEP 1995); *Letter to McNulty*, EHLR 213:108 (OSEP 1987) ("While there is no requirement that the State definition be identical to the Federal one, it must, of course, be consistent with the Federal standard."); *see also Letter to Smokoski*, EHLR 213:130 (OSEP 1987).

IDEA "preempts the Idaho Constitution."[40]

As of September 1, 1996, no school district has challenged the federal regulation by requiring all five SED characteristics to be present before acknowledging a student as SED. Such a challenge would, most likely, fail.

The IDEA "was enacted 'in pursuance' of the United States Constitution" and thus the IDEA "preempts the Idaho Constitution."

—Idaho Supreme Court
Doolittle v. Meridian Joint Sch. Dist. No. 2

[40] *Doolittle v. Meridian Joint Sch. Dist. No. 2*, 96.13 ISCR 588, 592 (1996).

IV. THE FIVE ESSENTIAL CONTINGENCIES OF SED

Serious emotional disturbance (SED) is defined in part as: "[1] A condition [2] exhibiting one or more of the following characteristics [3] over a long period of time [4] and to a marked degree [5] that adversely affects a child's educational performance."[41]

This definition contains five key contingencies which comprise the *sine qua non*[42] for SED classification. In order for a student to qualify for special education and related services under the category of SED, he/she must meet all five of the following contingencies:

1. The student must have a condition;
2. The student must have one or more of the five SED characteristics;
3. The characteristic must have been present over a long period of time;
4. The characteristic must be to a marked degree; and
5. The student's educational performance must be adversely affected.

Note: Students diagnosed with schizophrenia automatically meet the definition of SED (see Section VI).

1. What is "a condition"?

The word "condition" is not defined in the federal regulation. A dictionary defines a condition as "something that limits or modifies the existence or character of something else . . . the physical status of the body as a whole . . . or one of its parts--usually used to indicate an abnormality."[43] Since "condition" is not defined in the federal regulation, one can assume that Congress intended that the usual and customary definition and interpretation be used.

Frequently, the term condition refers to a cluster of ailments exhibited by a single student. A sampling of conditions that were found to be SED include: a student with oppositional disorder, hostile, aggressive, and withdrawn in relationships;[44] a student with severe diabetes, seizure disorder, and classic narcissistic personality;[45] a student with conduct disorder, socialized,

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[41] 34 C.F.R. § 300.7(b)(9)(i) (1995).

[42] Sine qua non is defined as: "That without which the thing cannot be. An indispensable requisite or condition." BLACK'S LAW DICTIONARY 1385 (6th ed. 1990).

[43] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED 473 (1986).

[44] *In re Kristopher H.*, 1985-86 EHLR DEC. 507:183 (SEA Wash. 1985).

[45] *In re Jeffrey G.*, 1985-86 EHLR DEC. 507:438 (1986).

nonaggressive, and developmental arithmetic disorder.[46]

2. What constitutes "one or more of the following characteristics"?

To qualify as SED, a student must have *one or more* of the five characteristics set forth in the federal regulation. The five characteristics are:

1. An inability to learn that cannot be explained by intellectual, sensory, or health factors;

2. An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;

3. Inappropriate types of behavior or feelings under normal circumstances;

4. A general pervasive mood of unhappiness or depression; or

5. A tendency to develop physical symptoms or fears associated with personal or school problems.

Each of these characteristics will be described in detail in Section V beginning on page 19.

3. What is "a long period of time"?

Professional criteria and standards may set forth a minimum length of time before a particular disorder is recognized to exist.[47] An example of such professional criteria is in the definition of schizophrenia, wherein an individual must have exhibited the characteristic symptoms for at least six months before a proper diagnosis can be made.[48] Similarly, the diagnostic criteria for Attention-Deficit/Hyperactivity Disorder require particular symptoms of inattention to have persisted for at least six months.[49]

A number of states have pre-defined "a long period of time" as a specific range of time—generally between two and nine months—during which a condition must have been present.[50] Idaho has not pre-defined the term "a long period of time."

Temporary periods of instability caused by such problems as a death in the family, separation or divorce, or a new school do not usually qualify as "a long period of time."[51]

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[46] *Edward A.F. v. Clint Independent Sch. Dist.*, 1986-87 EHLR DEC. 508:204 (SEA Tex. 1986).

[47] ID. DEPT. OF ED., IDAHO SPECIAL EDUCATION IMPLEMENTATION MANUAL C-4 (Oct. rev., Sept. 1993).

[48] AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 273 (4th ed. 1994) [hereinafter DSM-IV].

[49] *Id.* at 83.

[50] *Schrag Letter*, EHLR 213:247, 249 (OSEP 1989).

[51] ID. DEPT. OF ED., IDAHO SPECIAL EDUCATION IMPLEMENTATION MANUAL C-3 (Oct. rev., Sept. 1993); *Pflugerville Indep. Sch. Dist.*, 21 IDELR

In evaluating any student for a disability, the student's disability must be reviewed on its unique facts and circumstances. This includes determining what, for each child, "a long period of time" should be defined as.[52]

4. What is "a marked degree"?

The term "a marked degree" does not have a legal definition. One hearing officer looked to the *American Heritage Dictionary New College Edition* for the definition of "marked" and found that it was defined as "'[h]aving a noticeable character or trait; clearly defined.'"[53]

Some professionals in the special education field define "a marked degree" as having two separate components: pervasiveness and intensity. "Pervasiveness refers to the continuity of the negative behaviors; intensity refers to the demonstration of negative behaviors in an overt, acute and observable manner."[54]

Other states interpreting the phrase "a marked degree" refer to the "frequency, duration and/or intensity of the behavior in comparison to the student's peers and/or school and community norms. Terms such as acute, continuous, and/or pervasive are sometimes employed for clarification purposes."[55]

Often, standardized and/or norm-referenced personality inventories and other instrument results are used to determine "a marked degree;" such inventories and results should not be the only source of information used for a student.[56] No single procedure may be used as the sole criterion for determining a Free Appropriate Public Education (FAPE) for a child.[57] Other procedures should be considered, and documented, if appropriate for a student.

One procedure for assessing whether a student suffers from a condition to "a

309, 311 (SEA Tex. 1994) ("[I]t does not follow that children of separation and divorce are emotionally disturbed for the transitory period of adjustments.")

[52] *Letter to Woodson*, EHLR 213:225, 226 (OSEP 1989) (In determining whether a student's characteristics of his/her disability have persisted over a period of time and to a degree sufficient to have adversely affected educational performance, "these determinations are based largely on the unique facts and circumstances of a particular case. Thus, State and local educators must make the necessary determinations as to temporal threshold and degree on a case by case basis to ensure that children are not improperly classified as 'handicapped' for EHA-B [IDEA] purposes." (citation omitted)); *Northside Indep. Sch. Dist.*, 1 ECLPR 370 (SEA Tex. 1993) (A five-year-old student was emotionally disturbed, as well as being classified as other health impaired and developmentally disabled, but he was not "so classified due to his young age and his evolving changes.")

[53] *Conejo Valley Unified Sch. Dist.*, 1985-86 EHLR DEC. 507:213, 215 (SEA Cal. 1985).

[54] *Id.*

[55] *Schrag Letter*, EHLR 213:247, 249 (OSEP 1989).

[56] ID. DEPT. OF ED., IDAHO SPECIAL EDUCATION IMPLEMENTATION MANUAL C-4 (Oct. rev., Sept. 1993).

[57] 34 C.F.R. 300.532(3)(d) (1995).

marked degree" includes the use of several knowledgeable observers in more than one setting. To avoid bias, the observers should not have direct involvement with the student. The observers should be concerned with: 1) watching the behavior of a particular student and assessing whether a problem exists; and 2) determining if the frequency, intensity and/or duration of the student's behavior is significantly different from other students' behavior in the same or similar circumstances.[58]

5. How is "adversely affects a child's educational performance" defined?

In order to establish eligibility as SED, an adverse affect on educational performance must be shown, even though a student may have exhibited SED characteristics for "a long period of time" and to "a marked degree."[59]

In determining whether a student's "educational performance" is being "adversely affected," there should be evidence that the student's behavior and decreased educational performance are related.[60] The following questions should be applied to each student being evaluated for the disability of SED:

1. Is the educational performance of the student in question substantially within the range expected of the student based on his/her chronological age?

2. If the student is performing below academic expectations, is the probable cause emotional problems?

3. Are the emotional problems affecting educational performance of the student to a greater degree than similar problems affecting the performance of peers?

4. Does the student achieve passing grades?

5. Does the student maintain regular academic growth?

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[58] ID. DEPT. OF ED., IDAHO SPECIAL EDUCATION IMPLEMENTATION MANUAL C-4 (Oct. rev., Sept. 1993).

[59] *Fauquier County Pub. Sch.*, 20 IDELR 579, 583 (SEA Va. 1993) (quoting *Z. v. Fairfax County Public Schools* (1986)).

[60] *Berkeley Unified Sch. Dist.*, 1985-86 EHLR DEC. 507:435 (SEA Cal. 1986) (A student was found not to be SED since, despite poor academic performance, she was able to learn.) *Contra In re Christopher H.*, 1985-86 EHLR DEC. 507:183, 187 (SEA Wash. 1985) (Even though a student was performing at or near grade level, a hearing officer noted: "[A] child who is hostile, aggressive, withdrawn in personal relationships with both teacher and peers, is isolated in the classroom and whom a psychiatrist has diagnosed as being close to being institutionalized, that child is certainly not being educated."); *Seattle School Dist. No. 1 v. B.S.*, 82 F.3d 1493, 1500 (9th Cir. 1996) (A student was "unable to derive *any* meaningful educational benefit from her past education," although she was exceptionally bright and tested appropriately on standardized tests. The student's educational progress was deteriorating, and she was unable to make productive use of what she learned.)

6. Has the student been held back?

7. Does the student demonstrate severe deficiencies in social skills or social competencies that obstruct learning?

8. Is the student frequently absent? If so, how have grades been affected?[59]

The answers to these questions should be reviewed by a Multi-Disciplinary Team and a Child Study Team to determine whether a student's "educational performance" is "adversely affected" by the student's emotional problems, which may be manifested through the student's behavior. As is the case for any student with a disability, the determination of whether a student's emotional problems "adversely affects educational performance" is "based largely on the unique facts and circumstance of the particular case."[60]

It should also be kept in mind that "educational performance" is not limited to academic performance, but may also include peer interaction, participation in class activities, and classroom conduct, as well as standardized testing, homework/quizzes, and following directions.[61]

The Multi-Disciplinary Team and the Child Study Team must look to the actual emotional and behavioral problems of the student in determining SED classification.

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[59] ID. DEPT. OF ED., IDAHO SPECIAL EDUCATION IMPLEMENTATION MANUAL C-4 to C-5 (Oct. rev., Sept. 1993).

[60] *Schrag Letter*, EHLR 213:247, 249 (OSEP 1989).

[61] *Oakland Unified Sch. Dist.*, 1985-86 EHLR DEC. 507:191 (SEA Cal. 1985); *Rose Chester Area Sch. Dist.*, 18 IDELR 802 (SEA Pa. 1992); *accord In re Kristopher H.*, 1985-86 EHLR DEC. 507:183, 187 (SEA Wash. 1985) (A hearing officer quoted the definition of education found in *Funk and Wagnall's New Standard Dictionary* which stated education "*includes not only the narrow conception of instruction, to which it was formerly limited but embraces all forms of human experience*." (emphasis original)); *see also Seattle School Dist. No. 1 v. B.S.*, 82 F.3d 1493 (9th Cir. 1996) (Unique educational needs include a disabled child's academic, social, health, emotional, communicative, physical, and vocational needs.).

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V. SED CHARACTERISTICS DEFINED

As part of meeting all five contingencies listed in Section IV, a student must experience *"one or more* of the following characteristics" to meet the federal definition of SED:

1. An inability to learn that cannot be explained by intellectual, sensory, or health factors;
2. An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
3. Inappropriate types of behavior or feelings under normal circumstances;
4. A general pervasive mood of unhappiness or depression; or
5. A tendency to develop physical symptoms or fears associated with personal or school problems.[64]

The five characteristics listed above were also mentioned in Section IV (see page 14, item 2); however, this section discusses each of these characteristics in detail.

[64] 34 C.F.R. § 300.7(b)(9)(i)(A)-(E) (1995).

Note: Students diagnosed with schizophrenia automatically qualify as SED (see Section VI).

1. What does it mean for a student to have "an inability to learn that cannot be explained by intellectual, sensory, or health factors"?

To meet this characteristic, a student need not be totally incapable of learning, but rather the student's emotional condition must significantly interfere with his/her ability to benefit from instruction.[65] An "*unwillingness*" to learn should be distinguished from an "*inability*" to learn.[66]

In determining whether a student qualifies as SED under this characteristic, the following questions should be asked:

[65] *E.g., New York City Sch. Dist. Bd. of Educ.*, 18 IDELR 1326, 1328 (SEA N.Y. 1992) (A hearing officer held that an inability to learn "does not require that the child be totally incapable of learning," but rather that "a child's emotional condition has a significant effect upon the child's educational performance." The hearing officer held that a child was properly classified as emotionally disturbed "because of the child's inability to remain on task and impulsive problem solving style, which inhibit his ability to learn and his inability to build and maintain satisfactory interpersonal relationships with peers and teachers.").

[66] *Mobile County Bd. of Educ.*, 23 IDELR 591, 599 (SEA Ala. 1995) (A student's poor grades did not demonstrate an "inability to learn," but rather an unwillingness to do the work.).

1. Is the student's decrease in achievement based on the difference between the student's ability to learn and his/her performance?

2. Is the student's behavior, or his/her inability to self-organize in school, inability to stay on task, and/or inability to retain material impeding the student's learning?[67]

Depending on the answers to the above-stated questions, a student may be experiencing an inability to learn that is not explained by intellectual, sensory, or health factors.

Although a student may in fact suffer from intellectual, sensory, or health factors, these factors cannot be the *primary* cause of a student's emotional disturbance to meet the definition of SED.[68]

2. What does it mean for a student to have "an inability to build or maintain satisfactory interpersonal relationships with peers and teachers"?

SED students have met this characteristic in a variety of ways. Examples include: a student whose only interaction with peers and teachers was aggressive or violent;[69] a student who had difficulty making and maintaining friendships;[70] a student who maintained only one-sided, abusive, and unhealthy relationships;[71] a student who was withdrawn and unable to build or maintain satisfactory interpersonal relationships with peers and teachers.[72]

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[67] ID. DEPT. OF ED., IDAHO SPECIAL EDUCATION IMPLEMENTATION MANUAL C-2 (Oct. rev., Sept. 1993).

[68] *Id.*

[69] *Emery Unified Sch. Dist.*, 22 IDELR 1071, 1072 (SEA Cal. 1995); *see also Dallas Sch. Dist. v. Richard C.*, 24 IDELR 241, 244-245 (Pa. Commw. Ct., 1996) (A student was found to be unable to build or maintain satisfactory interpersonal relationships with peers and teachers, and also exhibited inappropriate behavior at school under normal circumstances. Some of the student's behavior included:

> standing in the corner of the room and pretending to urinate using sound effects and gestures or telling people to step over the puddle on the floor because he just wet his pants. . . . [s]pitting in students' faces or on the floor. . . . asking to use the phone to talk to his dead grandmother who is very sick. . . . [s]aying, 'I can't wait to become a skin head so I can kill people' . . . .

[70] *Babb v. Knox County School System*, 965 F.2d 104, 107 (6th Cir. 1992) ("This inability to create normal social bonds no doubt stems, in part, from tendencies that have resulted in physical abuse of siblings and classmates, torture of animals, and property theft and destruction." The student, at age four, was expelled from pre-school for breaking a gerbil's leg and urinating on other children. He had also broken his stepbrother's arm at least once.).

[71] *Lapides v. Coto*, 1987-88 EHLR DEC. 559:387, 390 (N.D. Cal. 1988).

[72] *In re Kathleen B.*, 1985-86 EHLR DEC. 507:345, 347 (SEA Mass. 1985) (A student was withdrawn and unable to form peer relationships or to carry on anything more than minimal social interactions. This minimal progress occurred with the support of regular psychotherapy.)

Students who have satisfactory relationships with peers in a subculture do not fall into this section,[73] nor do students who have some interactions with teachers and can participate in small groups.[74] This definition also does not apply to those students who have problems with a particular teacher or with one or more peers.[75]

3. What does it mean for a student to have "inappropriate types of behavior or feelings under normal circumstances"?

Inappropriate types of *behavior* may include "bizarre verbalizations, overreactions, repeated recitation of words, fetishes, and obsessive and compulsive behaviors."[76] It may also include "inappropriate sexual behaviors such as inappropriate touching of others, public masturbation, unusual or provocative sexual verbalization."[77]

Although a student may exhibit inappropriate behavior, he/she may not qualify for services under this section if the student is *able* to conform his/her behavior when the *desire to do so is adequate*.[78]

Inappropriate types of *feelings* include "negative self statements as well as feelings which are reflected in and inferred from observable behavior,"[79] including behavior stemming from a fantasy life in which the student "gets revenge" and that results in "the potential for aggressive acting out."[80] School officials should document each instance when persistent and significantly inappropriate feelings exist—typically, feelings not justified by circumstances.[81]

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[73] ID. DEPT. OF ED., IDAHO SPECIAL EDUCATION IMPLEMENTATION MANUAL C-2 (Oct. rev., Sept. 1993); *accord Doe v. Sequoia Union High Sch. Dist.*, 1987-88 EHLR DEC. 559:133 (N.D. Cal. 1987).

[74] *Berkeley Unified Sch. Dist.*, 1985-86 EHLR DEC. 507:435, 436 (SEA Cal. 1996) (A student had established interaction and communication with some of her teachers, and when she participated in small groups, she was accepted. The student did "not seem to mind being regarded as different or 'weird,' a description readily given by adolescents to non-conforming peers and appears at times to play into this role, also a reaction within normal limits.").

[75] ID. DEPT. OF ED., IDAHO SPECIAL EDUCATION IMPLEMENTATION MANUAL C-2 (Oct. rev., Sept. 1993); *Schrag Letter*, EHLR 213:249 (OSEP 1989) ("The essential element appears to be the student's inability to control his/her behavior (*Doe v. Maher*, 793 F.2d 1470, 1480 footnote 8, (9th Cir. 1986)) and conform his/her conduct to socially acceptable norms (*Honig v. Doe*, 108 S.Ct. 592, 595 (1988)).").

[76] ID. DEPT. OF ED., IDAHO SPECIAL EDUCATION IMPLEMENTATION MANUAL C-2 (Oct. rev., Sept. 1993).

[77] *Id.*

[78] *Henry County Bd. of Educ.*, 22 IDELR 761, 763 (SEA Ala. 1995).

[79] *Id.*

[80] *In the Matter of Long Beach Unified Sch. Dist.*, 1984-85 EHLR DEC. 506:274, 276 (SEA Cal. 1984).

[81] ID. DEPT. OF ED., IDAHO SPECIAL EDUCATION IMPLEMENTATION MANUAL C-2 to C-3 (Oct. rev., Sept. 1993).

4. What does it mean for a student to have "a general pervasive mood of unhappiness or depression"?

Pervasive is the adjective of "pervade," which is defined as "to become diffused throughout every part of."[82] Pervasive moods may include "constant crying, withdrawal, boredom and depression, as well as angry, aggressive or agitated behavior. Also included are eating and sleeping problems, loss of interest in usual activities, as well as feelings of hopelessness."[83]

Although a student may exhibit depression or unhappiness to a marked degree and for a long period of time, the depression or unhappiness must also "adversely affect the student's educational performance."[84] In a case where a student exhibited a mood of unhappiness or depression at home, but not at school, it was held not to be pervasive.[85]

5. What does it mean for a student to have "a tendency to develop physical symptoms or fears associated with personal or school problems"?

Physical symptoms have included headaches, nausea, asthma, ulcers, and colitis[86] as well as tiredness and stomachaches.[87]

In one case, a student's emotional difficulties were found by a hearing officer to have resulted in stress-induced headaches and stomachaches at school. The student was found to be SED since his emotional difficulties significantly impacted his educational performance over a sustained period of time, even though he had not failed a significant number of academic courses. The student was also found to be unable to maintain interpersonal relationships with peers and teachers.[88]

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[82] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED 1688 (1986).

[83] ID. DEPT. OF ED., IDAHO SPECIAL EDUCATION IMPLEMENTATION MANUAL C-3 (Oct. rev., Sept. 1993).

[84] *In re Capistrano Unified Sch. Dist.*, 1984-85 EHLR DEC. 506:106, 108 (SEA Cal. 1984) ("The student's behavior at home was characterized "by violation of parental guidelines, manipulative [sic] and defiant behavior toward adults and quarrelsomeness with his brother. . . . [The District] concedes that Petitioner [the student] has significant emotional problems outside the school context." The student exhibited the behavior at home but not at school. Therefore, he was found to be not seriously emotionally disturbed. *Id.* at 107).

[85] *Berkeley Unified Sch. Dist.*, 1985-86 EHLR DEC. 507:435 (SEA Cal. 1996).

[86] ID. DEPT. OF ED., IDAHO SPECIAL EDUCATION IMPLEMENTATION MANUAL C-3 (Oct. rev., Sept. 1993). *But see Berkeley Unified School District*, 1985-86 EHLR DEC. 507:435 (SEA Cal. 1986) (A student had various physical ailments such as headaches, body and stomach aches, vomiting, and excessive sleeping. She was not easily wakened. At home the student showed little interest in any activity other than martial arts, and she spent much time immobile, curled up on the floor. Medical tests failed to show any physical cause. The hearing officer found the student was not seriously emotionally disturbed.).

[87] *Cornwall Cent. Sch. Dist. Bd. of Educ.*, 17 EHLR 1023 (SEA N.Y. 1991).

[88] *Id.*

VI. SCHIZOPHRENIA AND SED

Students properly diagnosed with schizophrenia *automatically* qualify as SED; they are not required to meet the five contingencies or any of the five characteristics described in the federal regulation on SED, as *all other* SED students must[89] (see Sections IV and V).

Schizophrenia is a psychotic disorder[90] and is a disturbance that lasts for at least six months and includes at least one month of active-phase symptoms.[91] Schizophrenia is the only term listed in the federal regulation on SED that is also defined by the *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, (DSM-IV)—a guide frequently used by medical professionals.

The following page lists the "Diagnostic criteria for Schizophrenia" as defined in the DSM-IV. The reader should note that the criteria for schizophrenia established in the DSM-IV resemble the criteria for SED established in the federal regulation. Although the federal regulation does not require the use of the DSM-IV in arriving at a diagnosis,[92] the DSM-IV is perhaps the most well-used guide for diagnosing mental disorders.

The federal definition of SED does not address whether the diagnosis of schizophrenia must be conducted by a medical professional. However, if a medical professional has diagnosed a student as schizophrenic, that student is clearly entitled to services under the IDEA if he/she *needs* special education and related services.[93]

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[89] 34 C.F.R. 300.7(b)(9)(iii) (1995).

[90] The definition of *psychotic*, as it applies to schizophrenia, refers to "delusions, any prominent hallucinations, disorganized speech, or disorganized or catatonic behavior." AMERICAN PSYCHIATRIC ASS'N, DSM-IV 273 (4th ed. 1994).

[91] *Id.* at 273.

[92] 34 C.F.R. pt. 300 (1995).

[93] 34 C.F.R. § 300.7(a)(1) (1995).

Diagnostic criteria for Schizophrenia

A. *Characteristic symptoms*: Two (or more) of the following, each present for a significant portion of time during a 1-month period (or less if successfully treated):

(1) delusions
(2) hallucinations
(3) disorganized speech (e.g., frequent derailment or incoherence)
(4) grossly disorganized or catatonic behavior
(5) negative symptoms, i.e., affective flattening, alogia, or avolition

Note: Only one Criterion A symptom is required if delusions are bizarre or hallucinations consist of a voice keeping up a running commentary on the person's behavior or thoughts, or two or more voices conversing with each other.

B. *Social/occupational dysfunction*: For a significant portion of the time since the onset of the disturbance, one or more major areas of functioning such as work, interpersonal relations, or self-care are markedly below the level achieved prior to the onset (or *when the onset is in childhood or adolescence, failure to achieve expected level of interpersonal, academic, or occupational achievement*) [emphasis added].

C. *Duration*: Continuous signs of the disturbance persist for at least 6 months. The 6-month period must include at least 1 month of symptoms (or less if successfully treated) that meet Criterion A (i.e., active-phase symptoms).

D. *Schizoaffective and mood Disorder exclusion*: Schizoaffective Disorder and Mood Disorder With Psychotic Features have been ruled out because either (1) no Major Depressive, manic, or Mixed Episodes have occurred concurrently with the active-phase symptoms; or (2) if mood episodes have occurred during active-phase symptoms, their total duration has been brief relative to the duration of the active and residual periods.

E. *Substance/general medical condition exclusion*: The disturbance is not due to the direct physiological effects of a substance (e.g., a drug of abuse, a medication) or a general medical condition.

F. *Relationship to a Pervasive Developmental Disorder*: If there is a history of Autistic Disorder or another Pervasive Developmental Disorder, the additional diagnosis of Schizophrenia is made only if prominent delusions or hallucinations are also present for at least a month (or less if successfully treated).[24]

[24] AMERICAN PSYCHIATRIC ASS'N, DSM-IV 285-286 (4th ed. 1994).

VII. SOCIAL MALADJUSTMENT VS. SED

The category of SED does not include students who are socially maladjusted unless the student *also* meets the definition of SED. In such circumstances, a student identified as socially maladjusted must, like any other student, meet all the criteria defined in the federal regulation before being classified as SED[95] (see Sections IV and V).

Students found to be socially maladjusted, but not SED, have included: students who refuse to obey school, home, and societal rules;[96] students who externalize blame and are oppositional and argumentative;[97] students who chronically misbehave[98] and are in trouble

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[95] 34 C.F.R. pt. 300 (1995); *A.E. v. Independent Sch. Dist. No. 25, of Adair Co., Oklahoma*, 936 F.2d 472, 476 17 IDELR 950, 952 (10th Cir. 1991) ("That a child is socially maladjusted is not by itself conclusive evidence that he or she is seriously emotionally disturbed.").

[96] *Doe v. Sequoia Union High Sch. Dist.*, 1987-88 EHLR DEC. 559:133, 135 (N.D. Cal. 1987) (A U.S. District Court in California accepted an expert witness's definition of "socially maladjusted" as being "a persistent pattern of violating societal norms with lots of truancy, substance and sex abuse, i.e., a perpetual struggle with authority, easily frustrated, impulsive, and manipulative."); *Corpus Christi Independent Sch. Dist.*, 18 IDELR 1281, 1282 (SEA Tex. 1992) (A hearing officer defined "socially maladjusted" as one who

> refuses to obey school, home and societal rules. He willfully stays out at night and is beyond control of his parents' discipline. He is an inveterate substance abuser. He manifests anger and hostility toward his parents. He refuses to rise in the mornings for school and he refuses in the main to attend school. He volitionally chooses to disobey his parents, to abuse controlled substances, and to not attend school . . .")

[97] *Doe v. Bd. of Educ. of the State of Connecticut*, 753 F.Supp. 65, 17 EHLR 37, 39 (D. Conn. 1990) (The court, quoting from a social worker's report and from a clinical psychologist, described a student thus:

> Externalizes blame for difficulties. Insight and judgement believed significantly impaired at this time. . . . [H]e exhibits many characteristics of depression, but this is best understood as an underlying condition. In may ways, [his] episodes of rage is [sic] an optionless, "last ditch" effort to ward off a total experience of dysphoria. . . . [the student had] "significant difficulties in dealing with his emotions, and employs considerable psychological energy to remain distant from an affective interaction. . . ." [His] "mood is angry and sad. He relates in an irritable, agitated manner. He tends to be oppositional and argumentative. No evidence of psychosis is noted.").

[98] *Henry County Bd. of Educ.*, 22 IDELR 761, 763 (SEA Ala. 1995)

> The difference between "socially maladjusted" and EC [SED] has to do with the Child's ability to choose how he will behave and perform. To find the Child "emotionally conflicted" or "seriously emotionally disturbed" requires a finding of an absolute inability with regard to the definitional terms heretofore used and must be considered a very serious condition which does not apply to every "bad" child. In fact, the Child has apparently gotten along reasonably

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with the law,[97] students who dislike school, abuse drugs, are beyond control of parents, are hostile toward authority figures, and whose emotional state fluctuates as a direct consequence of his her environment.[98]

Keep in mind, a student found to be socially maladjusted, but not SED, *may* qualify for a Free Appropriate Public Education (FAPE) under Section 504.[99]

In one case, a socially maladjusted student was classified as SED based on a finding by a clinical psychologist who stated that the student's social maladjustment was "one of many symptoms that reflect[ed] her underlying emotional disturbance."[100] This case is described below.

A Case Study: *In the Matter of the Education of S.S. and Lake Oswego Sch. Dist.*

A student had a long history of emotional and behavioral problems involving the schools, various mental health facilities, and the juvenile courts in two counties.[101]

She was initially diagnosed as suffering from a conduct disorder, socialized, nonaggressive. She had many conflicts with both teachers and peers, and she was loud and obscene in class. Her behavior included non-compliance and threatening and fighting with other students. The student made ineffectual suicide attempts and scratched designs on her body with razor blades. She also burned herself with a cigarette lighter. She was later diagnosed as having a severe borderline personality disorder with considerable anti-social behavior, as well as having all the behaviors characteristic of a conduct disorder. She also experienced mood swings and was continually depressed or upset about something.

The student's intelligence was within normal limits. The Multi-Disciplinary

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well with teachers and peers most of [sic] time and has simply been guilty of chronic misbehavior.

[97] *Fairfax County Pub. Sch.*, 22 IDELR 998, 999 (SEA Va. 1995) (A student had a "conduct disorder" and a "dysthymic disorder" and had experienced academic, behavioral, and legal problems for some time.).

[98] *Conejo Valley Unified Sch. Dist.*, 1985-86 EHLR DEC. 507:213, 214 (SEA Cal. 1985).

> The socially maladjusted student is characterized by inability to tolerate structure, marked dislike of school, behavior beyond control of parents, drug abuse, poor tolerance for frustration, excessive need for immediate gratification, disregard or hostility toward authority figures, lack of social judgment, inconsistent performance, positive behavior response when strong structure is instituted and lack of pervasiveness of disorder (i.e. emotional state fluctuates as a direct consequences of environment.

[99] *Irvine (CA) Unified Sch. Dist.*, EHLR 353:192 (OCR 1989) (The Office for Civil Rights found that a school district erred when it neglected to consider whether "social maladjustment" might be a handicapping condition under Section 504.)

[100] *S.S. and Lake Oswego Sch. Dist.*, Case No. DP 91-117, at 11 (unpublished decision, SEA Or. Aug. 3, 1993).

[101] *In the Matter of the Education of S.S. and Lake Oswego School District*, Case No. DP 91-117 (unpublished decision, SEA Or. Aug. 3, 1993).

Team (MDT) determined that the student was socially maladjusted, not SED. The MDT found that the student had demonstrated an ability to do her schoolwork and that she could control her behavior when it was to her advantage.

The hearing officer, based upon the testimony of various expert witnesses, found that the student was

> a very damaged individual, very immature, extremely needy, lacking self-esteem, lacking a social connection either generally or within a family, and lacking sufficient internal structure to formulate a decent plan for the future. S.S.'s [the student's] asocial behavior does not result from antisocial tendencies in her personality. *Rather, her social maladjustment is one of many symptoms that reflect her underlying emotional disturbance.*[104] (Emphasis added.)

One expert who testified stated that the definition of social maladjustment did not begin to describe the global nature of the student's disturbance. The hearing officer found that the student was SED beyond a reasonable doubt. The student had demonstrated, over a long period of time and to a marked degree: 1) an inability to learn which could not be explained by intellectual, sensory-motor, or health factors; 2) an inability to build or maintain satisfactory interpersonal relationships; 3) inappropriate types of behavior under normal circumstances; and 4) possibly, a general pervasive mood of unhappiness or depression.

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[104] *Id.* at 11.

VIII. CONDUCT DISORDER vs. SED

Within a discussion of SED, the term "conduct disorder" is arguably one of the most disagreed upon terms.[105] The most restrictive view contends that conduct disorder is *not* a condition under which a student might meet the definition of SED.[106] At times, courts and hearing officers have held that students with conduct disorder were SED; at other times, courts and hearing officers have held that students with conduct disorder were not SED. In general, where a student with conduct disorder was found to be SED, conduct disorder was one of several ailments associated with a particular student.

Conduct Disorder as a Psychiatric Disorder under DSM-IV

The American Psychiatric Association describes the essential feature of conduct disorder as "a repetitive and persistent pattern of behavior in which the basic rights of others or major age-appropriate societal norms or rules are violated."[107]

Conduct disorder is manifested by the presence of three (or more) of the criteria listed on page 30 within the past 12 months, with at least one criterion present within the past six months. The diagnostic criteria also require that the disturbance in behavior causes clinically significant impairment in social, academic, or occupational functioning.[108]

Psychiatric Disorders and IDEA Eligibility

The Office of Special Education Programs (OSEP) makes it clear that a student with a psychiatric disorder or mental illness is not automatically entitled

(Continued on page 31)

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[105] Jane E. Slenkovich, *Can the Language "Social Maladjustment" in the SED Definition Be Ignored?*, 21 SCHOOL PSYCHOLOGY REV. 21-22 (1992); Russell Skiba & Kenneth Grizzle, *Qualifications v. Logic and Data: Excluding Conduct Disorders from the SED Definition*, 21 SCHOOL PSYCHOLOGY REV. 23-28 (1992); Steven R. Forness, *Legalism Versus Professionalism in Diagnosing SED in the Public Schools*, 21 SCHOOL PSYCHOLOGY REV. 29-34 (1992); Perry A. Zirkel, *Mutuality, Mountains, and Molehills*, 21 SCHOOL PSYCHOLOGY REV. 40-42 (1992); Mike Furlong, *Schools of Thought on SED And Social Maladjustment*, in 19 THE PSYCHOLOGIST (May 1996).

[106] JANE E. SLENKOVICH, IDEA AS APPLIED TO DSM IV DIAGNOSES 78 (1994) ("The DSM IV definition of Conduct Disorder describes the essence of *social maladjustment*. Since social maladjustment is expressly excluded from the IDEA definition of seriously emotionally disturbed, Conduct Disorder does not qualify as an IDEA serious emotional disturbance." (emphasis original)).

[107] AMERICAN PSYCHIATRIC ASS'N, DSM-IV 85 (4th ed. 1994).

[108] *Id.*

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Diagnostic criteria for Conduct Disorder

A. A repetitive and persistent pattern of behavior in which the basic rights of others or major age-appropriate societal norms or rules are violated, as manifested by the presence of three (or more) of the following criteria in the past 12 months, with at least one criterion present in the past 6 months:

Aggression to people and animals

(1) often bullies, threatens, or intimidates others
(2) often initiates physical fights
(3) has used a weapon that can cause serious physical harm to others (e.g., a bat, brick, broken bottle, knife, gun)
(4) has been physically cruel to people
(5) has been physically cruel to animals
(6) has stolen while confronting a victim (e.g., mugging, purse snatching, extortion, armed robbery)
(7) has forced someone into sexual activity

Destruction of property

(8) has deliberately engaged in fire setting with the intention of causing serious damage
(9) has deliberately destroyed others' property (other than by fire setting)

Deceitfulness or theft

(10) has broken into someone else's house, building, or car
(11) often lies to obtain goods or favors or to avoid obligations (i.e., "cons" others)
(12) has stolen items of nontrivial value without confronting a victim (e.g., shoplifting, but without breaking and entering, forgery)

Serious violations of rules

(13) often stays out at night despite parental prohibitions, beginning before age 13 years
(14) has run away from home overnight at least twice while living in a parental or parental surrogate home (or once without returning for a lengthy period)
(15) is often truant from school, beginning before 13 years

B. The disturbance in behavior causes clinically significant impairment in social, academic, or occupational functioning.[109]

[109] AMERICAN PSYCHIATRIC ASS'N, DSM-IV 90-91 (4th ed. 1994).

to special education and related services."[109] A student diagnosed with a conduct disorder may be eligible for special education and related services if he/she also meets the definition of SED[110] —or one of the other disabilities under the IDEA.

Conduct Disorder vs. Social Maladjustment

The question has been raised as to whether a student with a conduct disorder is SED. The term "conduct disorder" is not mentioned in the federal SED regulation, but the term "socially maladjusted" is mentioned. The regulation states that the term SED "does not apply to children who are socially maladjusted, *unless* it is determined that they have a serious emotional disturbance."[111] (Emphasis added.)

Some individuals have interpreted the "essence of social maladjustment"[112] as synonymous with conduct disorder. Following this rationale, a student diagnosed with *only* conduct disorder would —like a student identified as *only* socially maladjusted—not meet the definition of SED. The opposing view[113] holds that conduct disorder and social maladjustment are not the same, that students diagnosed with conduct disorder cannot automatically be excluded from SED classification.[114]

A Course of Action

Despite whatever label, i.e., conduct disorder, social maladjustment, is applied to a student, the Multi-Disciplinary Team (MDT) and the Child Study Team (CST) must look to the *actual emotional and behavioral problems* of the student in determining SED classification.

With few exceptions, students diagnosed with conduct disorder also suffer from a variety of other disorders and ailments. No "typical" finding for or against SED can be extrapolated from these cases of multiple disorders, as the next two paragraphs make apparent. This fact

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[109] *Letter to Boudinot*, EHLR 213:224, 225 (OSEP 1989) ("Commitment of a child to a psychiatric hospital for a psychiatric disturbance does not automatically entitle the child to a program of special education and related services."); *Letter to Lane*, 16 EHLR 959, 960 (OSEP 1990) ("Regardless of which handicapping condition is applicable to a particular child, a psychiatric disorder, alone, is not sufficient to make a child eligible for EHA-B services."); *Letter to McNair*, EHLR 213:108, 108 (OSEP 1987) ("It is entirely possible for a child to have serious mental illness resulting in dangerous behavior and/or institutionalization and at the same time have that child making normal progress in an educational program without special education services.")

[110] *Morgan Hill Unified Sch. Dist.*, 19 IDELR 557, 565 (SEA Cal. 1992) ("Pursuant to the federal definition of SED, the diagnosis of a conduct disorder and SED are not mutually exclusive and students with conduct disorders may also satisfy educational criteria for SED if it is determined that they are also seriously emotionally disturbed.")

[111] 34 C.F.R. § 300.7(b)(9)(ii).

[112] JANE E. SUCHAROWICH, IDEA AS APPLIED TO DSM IV DIAGNOSES 78 (1994).

[113] Russell Skiba & Kenneth Grizzle, *Qualifications: Logic and Data: Excluding Conduct Disorders from the SED Definition*, 21 SCHOOL PSYCHOLOGY REV. 23-28 (1991).

emphasizes the need for school districts to evaluate each student on a case-by-case basis and to consider *all* of the contingencies and characteristics which may influence SED classification (see Sections IV and V).

Cases Involving Conduct Disorder and Other Disorders held to be SED

A student with a conduct disorder, socialized, non-aggressive, and a developmental arithmetic disorder was found to be SED,[107] as was a student who had been diagnosed with a conduct disorder and a severe borderline personality disorder.[108] A student suffering from conduct disorder, severe solitary aggressive type, and paranoid and schizoid traits was also found to be SED.[109]

Cases Involving Conduct Disorder and Other Disorders held not to be SED

The problems of a student diagnosed with a conduct disorder and a related emotional disturbance were found not to be "of such a magnitude as to meet the federal definition of seriously emotionally disturbed."[110] SED classification was also denied to a student who had been diagnosed at various times with a conduct disorder, oppositional defiant disorder with depression, attention deficit disorder, developmental reading disorder, and an adjustment disorder with mixed disturbance of emotions and conduct.[111] A student whose behavior included lying, fighting, running away, and threatening others was found by a hearing officer to have behavior consistent with the diagnosis of a conduct disorder and was found not to be SED.[112]

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[107] *Edward A.F. v. Simi Independent Sch. Dist.*, 1986-87 EHLR DEC. 508:204 (1986) (A hearing officer found that a student had become increasingly unable to interact with peers and teachers and that his aggressive behavior towards other children had sharply increased. His behavior had been practically unmanageable in the school setting.)

[108] *In the Matter of the Education of S.S. and Lake Oswego Sch. Dist.*, Case No. DP 91-117, at 17 (unpublished decision, SEA Or. Aug. 3, 1991) (A hearing officer found that a student suffered from a deep underlying clinical depression, and thus had an underlying mood of unhappiness or depression. The student also had an inability to learn which could not be explained by intellectual, sensory, or health factors, and she lacked satisfactory interpersonal relationships.)

[109] *Bobby v. Knox County School System*, 963 F. 2d 101 (6th Cir. 1992).

[110] *A.E. v. Independent Sch. Dist. No. 25*, 17 EHLR 950, 952 (10th Cir. 1991).

[111] *Morgan Hill Unified Sch. Dist.*, 19 IDELR 557 (SEA Cal. 1992); *see also Fairfax County Pub. Sch.*, 22 IDELR 998 (SEA Va. 1995) (A student who had a clinical diagnosis as suffering from a conduct disorder and dysthymic disorder was found not to be SED. The primary purpose of a doctor's letter making such a clinical diagnosis was to convince a judge to commit the student to a camp in lieu of incarceration and did not support a finding of disability.); *In re: Burton Sch. Dist. and Fulton County Office of Education*, 110 LRP DEC. 504:133, 134 (SEA Cal. 1982) (quoting from a prior due process hearing decision) (A hearing officer found that a student with a severe conduct disorder and a depressive disorder was SED, and that the student's inappropriate behavior was "the tip of the iceberg and not the iceberg itself.")

[112] *Morgan Hill Unified Sch. Dist.*, 19 IDELR 557 (SEA Cal. 1992).

If anything, cases involving multiple disorders illustrate one important fact. Judging the difference between behavior resulting from SED and behavior resulting from non-SED conditions may be impossible. Such situations, as demonstrated in the following case study, may lead to a finding not of SED, but of another category of disability.

A Case Study: *Capistrano Unified Sch. Dist. v. Wartenberg*

In a case having precedence in Idaho, the Ninth U.S. Circuit Court of Appeals has also wrestled with the definition of conduct disorder.[17]

In the Ninth Circuit case, a student, Jeremy, 16, had always done very poorly in school. Various psychologists and counselors diagnosed him as having both Attention Deficit Disorder (ADD) and a conduct disorder. He began receiving special education in the second grade based on "visual motor integration" and "visual closure deficits."

In the seventh grade Jeremy was hospitalized for several months because of his aggressive, violent behavioral problems, including violent and dangerous attacks on his mother and cruelty towards his baby brother, setting fires, shoplifting, and lying. Jeremy had been taking Ritalin since age four, but it had not helped. The hospital psychiatrist noted that "Jeremy's intelligence seemed to be average, but his 'thought content revealed flight of ideas' and his 'insight and judgment were poor.'"[18] At the hospital Jeremy was given an electroencephalogram, and the results were abnormal. Reports concluded that he needed a very structured day treatment or residential placement.

After his hospitalization, Jeremy returned to public school and continued to do poorly. Despite the numerous recommendations that Jeremy be given a very structured environment, the school initially placed him in regular classes, where by the next fall, he was failing all of his 8th grade classes. Several subsequent changes were made to his Individualized Education Program (IEP), but the changes did not improve his performance. In one instance, the new program decreased the individualized attention he was scheduled to receive.

Jeremy's parents took Jeremy out of the public high school and placed him at the Mardan Center of Educational Therapy. The parents asked for reimbursement of tuition and fees spent on the placement and attorneys' fees. The due process hearing lasted ten days.

The school psychologist attributed Jeremy's poor performance to a conduct disorder. However, other testimony seemed to indicate that the failure was due to his ADD, not willful bad conduct, and that these two causes—ADD and conduct disorder—could not be separated out. The hearing officer found for the parents and held that "Jeremy's social and emotional problems could not be

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[17] *Capistrano Unified Sch. Dist. v. Wartenberg*, 59 F. 3d 884, 21 IDELR 804 (9th Cir. 1995).

[18] *Id.* at 891.

separated out from the symptoms associated with his specific learning disability."[117] A U.S. District Court affirmed the hearing officer's decision.

The Ninth Circuit reviewed the case not under the definition of SED, but rather under the category of children with "specific learning disabilities."[118] This category provides that:

> The term "children with specific learning disabilities" means those children who have a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. Such disorders include such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Such term does not include children who have learning problems which are primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.[119] (Emphasis added.)

In reviewing the definition of "children with specific learning disabilities" and the facts pertaining to Jeremy, the court held that:

> If Jeremy's failure at school resulted from misconduct, not a disorder, then he would not be entitled to have the school pay for his Mardan Center tuition and transportation. Likewise, if his failure was caused by a disorder, but the school's proposed individualized education program was appropriate, or Mardan Center was not appropriate, he would not be so entitled. . . . So, a child with a specific learning disability caused by any number of factors will qualify for assistance, while a child with a specific learning disability which is "primarily the result of [non-"serious"] emotional disturbance" will not.[120]

Witnesses at the due process hearing had testified that Jeremy's bad behavior — impulsiveness, rebellion against authority, and poor performance — was caused by his ADD. Since Jeremy's learning disability was the primary cause of his poor

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[117] *Id.* at 807 (quoting a hearing officer's decision).

[118] 20 U.S.C. § 1401(a)(15)(A)(1994).

[119] *Id.* at 808 (quoting 20 U.S.C. § 1401(a)(15)).

[120] *Id.* at 809.

performance, he was entitled to special education and related services. The Ninth Circuit held that "only if Jeremy's learning problems were 'primarily' caused by non-covered causes would he lose coverage."[127]

The court was not without disagreement in its opinion. In a dissent, one justice argued that Jeremy's behavior was caused by a conduct disorder, not his ADD. When Jeremy chose to control his behavior, he succeeded in school, and when he failed to maintain such control, he failed in school. The dissenting opinion stated: "School districts bear the responsibility of educating disabled students; they do not bear the responsibility of parenting anti-social students."[128] It must be remembered that a dissenting opinion is not the majority decision, but rather disagrees with the majority. The dissenting opinion, while perhaps stating the view of some readers, does not have precedence.

Although a child with primarily an emotional disturbance, but not SED, may not fall within the definition of "children with specific learning disabilities," a school district cannot withhold or stop its evaluation of the student. A school district must take into account other definitions under which the child might qualify for special education services, and it should also take into account the definition of disability under Section 504.[129]

[127] *Id.* at 810.

[128] *Id.* at 815.

[129] *West Chester Area Sch. Dist.*, 18 IDELR 802 (SEA Pa. 1992) (A student who needed only related services was found not to be eligible under IDEA; however, under Section 504, the student was eligible for the related services that she needed to benefit from her regular education.)

IX. DSM-IV MENTAL DISORDERS VS. SED

Published by the American Psychiatric Association, the *Diagnostic and Statistical Manual of Mental Disorders* Fourth Edition, (DSM-IV), classifies a variety of mental disorders. Health professionals use the DSM-IV as a guide for making diagnoses.

Some students evaluated for a disability under the category of SED have also been diagnosed with mental disorders. The IDEA neither requires nor precludes the application of DSM-IV criteria in making eligibility determinations.[130] The Office of Special Education Programs (OSEP) recognizes that the DSM-IV "classification system may assist State and local educators in evaluating and diagnosing handicapping conditions in children, including the handicapping condition, 'seriously emotionally disturbed.'"[131]

The issue of whether a student diagnosed with a mental disorder can qualify under the IDEA for special education and related services has been an issue reviewed by hearing officers and courts. A student with a mental disorder/psychiatric disorder[132] is not automatically eligible for special education and related services under the category of SED, nor can a student identified as SED be excluded from such services simply because he/she has a mental/psychiatric disorder. Each student must be evaluated on a case-by-case basis, as all other students are, to determine if the SED definition has been met.

Biologically-Based Brain Diseases

Students with biologically-based brain diseases (BBBD), including schizo-affective disorder, bipolar (manic-depressive) and unipolar disorders, pervasive developmental disorder, Tourette's disorder, obsessive-compulsive disorder, anxiety and panic disorders, attention deficit disorder, and attention deficit hyperactivity disorder *may* fall within the disability category of SED if these students meet the regulatory definition of SED.[133]

OSEP believes that an additional category for students identified with BBBD should not be added to the federal regulation since "as a philosophy . . . [OSEP] should not be moving in the direction of additional categories. . . . Rather . . . [it] should be focusing on the

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[130] *Letter to Woodson*, EHLR 213:224, 226 (OSEP 1989).

[131] *Id.* at 226.

[132] *Letter to Lane*, 16 EHLR 959 (OSEP 1990). *Letter to McNulty*, EHLR 213:109 (OSEP 1987) (Mentally ill students do not qualify for IDEA services by virtue of their mental illness.)

[133] *Letter to Peschel*, 17 EHLR 178 (OSEP 1990).

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identification and service-delivery issues of all students with disabilities."[134]

Examples of students with one or more disorders listed as BBBD and who also met the regulatory definition of SED include: a student with an oppositional disorder who was hostile, aggressive, withdrawn in relationships, and close to being institutionalized;[135] and a student with severe diabetes and a seizure disorder who had a classic narcissistic personality and strived to build a relationship only to devalue and destroy it over and over again.[136]

Addiction to Drugs and/or Alcohol

Addiction is not considered a disability under the IDEA, but there may be instances in which a student who is addicted to drugs or alcohol qualifies under the definition of SED.[137]

Drug use is *one* factor to look at when determining whether a student fits the definition of SED. Decisions from hearing officers and case law reveal that drug use may be part of the litany of factors and disorders that must be reviewed in determining whether a student is SED.[138]

In one situation, a hearing officer's decision that a student's drug use was a physical manifestation of her pervasive depression[139] was overturned by a U.S. District Court. The court held that the student's academic problems were due to her truancy, substance abuse, and social maladjustment, not SED.[140] Conversely, an Idaho hearing officer described a student's use of drugs as "deplorable and a tragedy,"[141] but found that the student's

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[134] *Id.* at 180.

[135] *In re Kristopher H.*, 1985-86 EHLR DEC. 507:183 (1985).

[136] *In re Jeffrey G.*, 1985-86 EHLR DEC. 507:438 (1986).

[137] *Sarah W. v. Independent Sch. Dist. of Boise City*, at 39 (unpublished decision, SEA Id. Feb. 14, 1995) (before the Idaho State Department of Education, State of Idaho, Findings of Fact, Conclusions of Law and Decision); *In re Child with Disability*, 1985-86 EHLR DEC. 507:388 (SEA Ill. 1986).

[138] *In re Child with Disability*, 1985-86 EHLR DEC. 507:388 (SEA Ill. 1986) (A seventeen-year-old student with a history of behavioral problems— including truancy, drug and alcohol abuse, and criminal wrongdoing—and who was diagnosed as being depressed and having underlying emotional disturbances was found to be SED.).

[139] *Sequoia Union High Sch. Dist.*, 1985-86 EHLR DEC. 507:495 (1986).

[140] *Doe v. Sequoia Union High Sch. Dist.*, 1987-88 EHLR DEC. 559:133 (N.D. Cal. 1987); *see also Corpus Christi Independent Sch. Dist.*, 18 IDELR 1281 (SEA Tex. 1992).

[141] *Sarah W. v. Independent Sch. Dist. of Boise City*, 39 (unpublished decision, SEA Id. Feb. 14, 1995) (before the Idaho State Department of Education, State of Idaho, Findings of Fact, Conclusions of Law and Decision).

> Sarah's drug use is deplorable and a tragedy. But I am not able to conclude from the evidence that all of Sarah's problems can be laid at the feet of drugs. The Menninger Clinic concluded that Sarah's underlying psychological and emotional problems led her to drug use, that she took drugs to make her feel happy and as a way to make friends. This appears to me to be a reasonable conclusion and a reasonable answer to the issue of whether her problem was drugs alone, or whether psychological problems were the root

underlying psychological and emotional problems *led her* to use drugs; the hearing officer found that the student was SED.

Conduct Disorder

The issue of conduct disorder is reviewed in Section VIII.

Depression

A student diagnosed with atypical depression and mixed personality disorder with schizotypal features[142] was found to be SED. Conversely, a student who was diagnosed with and hospitalized for major depression was found to have emotional difficulties, but not to the *degree* required by the definition of SED.[143]

The same conclusion was reached by hearing officers in two other cases. A student who was hospitalized for a variety of disorders—dysthymia, secondary, early onset; oppositional defiant disorder, severe; and possibly also had attention deficit hyperactivity disorder[144]—did not meet the definition of SED. SED classification was also denied to a student who had been diagnosed as having post traumatic stress disorder, oppositional defiant disorder, and dysthymia.[145]

Attention Deficient Disorder (ADD)/ Attention Deficient Hyperactivity Disorder (ADHD)

A student with ADD who was immature and impulsive, who had an aggressive and assertive approach to social interaction, who was unsuccessful in the regular academic setting, and who was unable to maintain satisfactory interpersonal relationships with peers and teachers was found to be SED.[146] A

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of the matter.
Id.

[142] *Berkeley Unified Sch. Dist.*, 1987-88 EHLR DEC. 509:197 (SEA Cal. 1987); *see also Doe v. Alabama State Department of Education*, 17 EHLR 41 (11th Cir. 1990) (A student classified as SED suffered from a major affective disorder, also known as manic depressive illness, and had substantial academic difficulty because of episodes of depression and unmanageable hyperactivity; this affected the student's ability to concentrate and caused him considerable stress when he was confronted by the normal educational environment.).

[143] *Doe v. Bd. of Educ. of the State of Connecticut*, 17 EHLR 37 (D. Conn. 1990).

[144] *Fauquier County Pub. Sch.*, 20 IDELR 579 (SEA Va. 1993) (A student was hospitalized following a temper outburst at home, during which he jumped from a second story window and ran, barefoot and without sufficient clothing, into the woods. Another hospitalization occurred because of severe rage outbursts. Prior to admission, the student had to be physically restrained at home. He had also threatened to kill his 16-year-old sister, who was pregnant.).

[145] *Old Orchard Beach Sch. Dept.*, 21 IDELR 1084 (SEA Me. 1994) (A student made poor choices and was aware of the consequences of her choices.).

[146] *Oneonta Central Sch. Dist.*, 1987-88 EHLR DEC. 509:129 (SEA N.Y. 1987); *see also Laughlin III v. Central Bucks Sch. Dist.*, 20 IDELR 894 (E.D. Pa. 1994) (A student's proposed placement in a combination SED and LD (learning disabled) program was appropriate since the student's severe emotional and behavioral

student whose severe emotional and behavioral problems went far beyond that of a typical ADHD student was also found to be SED.[47] Conversely, a student diagnosed with ADD and oppositional defiant disorder did not suffer from an "inability to learn," but rather, according to a hearing officer, an "unwillingness to do the work."[48]

An "unwillingness" to learn should be distinguished from an "inability" to learn.

—Alabama hearing officer
Mobile County Bd. of Educ.

problems went far beyond that of a typical attention deficient hyperactivity disorder child.)

[47] *Laughlin III v. Central Bucks Sch. Dist.*, 20 IDELR 894 (E.D. Pa. 1994). For further discussion of this case see Section X.

[48] *Mobile County Bd. of Educ.*, 23 IDELR 594, 599 (SEA Ala. 1995).

X. FIVE CASE STUDIES: Behavior/emotional problems held to be SED

As has been mentioned throughout this guide, in determining whether a student is SED, the facts must be reviewed in each case and applied to the situation at hand. The following overviews taken from various hearing officers and court decisions help put the different types of SED behavior into perspective.

Case Study One: ***M.R. by R.R. v. Lincolnwood Bd. of Educ.***

A student was diagnosed as having an emotional disorder.[19] A due process hearing was held concerning a placement issue for the eighth grade student who:

> [E]xhibits bizarre conduct such as barking and acting like a dog including licking his hands like paws; getting up and moving about the classroom at inappropriate times; biting his thumbs and pulling his hair; physically threatening conduct, acting argumentative and being unwilling to follow verbal instructions from teachers; accusing other children of hitting him and trying to hurt him when a student brushed against him in the hallway; laying on the floor in the hall on his side and going around in circles kicking at all of the students that are in the immediate area and then remaining still and unresponsive; deliberately falling on the floor; getting in fights with other students at recess and interrupting other students' recess activities; refusing to use the bathroom for long periods of time and then only unless the bathroom was empty and watched from the outside by staff; being disruptive in an assembly to the extent of having to be removed and then telling his teacher that he was going to kill her; free association, walking around the room imitating a computer; making fun of other students' names; excessive crying; increasing use of verbal threats against teachers and students coupled with getting close to others and raising his fist; tantrums; hitting a teacher and an aide; screaming and swearing over the office intercom system stating that "I'm going to kill all you [obscenity] . . ." making faces at other students; leaving his desk and

[19] *M.R. by R.R. v. Lincolnwood Bd. of Educ.*, 843 F. Supp. 1236, 20 IDELR 1123 (N.D. Ill. 1994)

> flicking the lights on and off. . . .[150]

The court upheld the school district's recommended placement for the student at a therapeutic day school because of the student's deteriorating and disruptive behavior.

Case Study Two: *Laughlin III v. Central Bucks Sch. Dist.*

The parents of a student with Attention Deficit Hyperactivity Disorder (ADHD) objected to the school district also classifying their child as SED.[151] The court held that the student's severe emotional and behavioral problems went far beyond that of a typical ADHD student. A pschoeducational evaluation conducted during the student's third grade year provided that:

> Personality assessment measures are reflective of an undersocialized youngster who shows evidence of pervasive anger as well as anxiety. He has a rich and often uncensored fantasy life that is filled with elements of hostility, danger and damage. Harry is a very troubled, insecure young man with poor self-esteem, whose controlling and negativistic behavior is seen in part as compensatory to his feelings of inadequacy and powerlessness. Harry has clearly, at this point, adopted an oppositional stance to authority, and focuses most of his energies into controlling and manipulative interactional patterns.[152]

The student was also admitted to in-patient psychiatric hospitalization during the spring of his fourth grade because he

> had threatened to run away or to kill himself, had become more physically violent, and had threatened violence against his mother. He reported that he sometimes heard voices saying "kill me" when someone picked on him and made him angry. In addition, he had "apparently established himself as an admired deviant powerful figure amongst his peers," some of whom got "into trouble" by "follow[ing] his example."[153]

The court upheld the school's classification of the student as SED and its placement of the student in a combination SED and learning disabled program.

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[150] *Id.* at 1238 (quoting from a Level II hearing officer's decision).

[151] *Laughlin III v. Central Bucks Sch. Dist.*, 20 IDELR 894 (E.D. Pa. 1994).

[152] *Id.* at 896 (quoting from a psycoeducational evaluation compiled by a licensed clinical and certified school psychologist).

[153] *Id.* at 897.

Case Study Three: *Lapides v. Cote*

A student displayed grossly inappropriate behavior and feelings under normal circumstances. The actions of the student convinced the court that the student was SED.[14]

> Chad has undeniably had more than his share of tragedy and pain, beginning at a very early age. However, this does not make hanging out of a third story window by a bedsheet, or cutting off the tip of his finger with a hatchet upon hearing of the death of a former friend's father, normal responses under the circumstances. Chad has had a long history of bizarre, often life-endangering behavior . . . This behavior has adversely affected Chad's educational performance. Thus, plaintiffs have met the requirements for being seriously emotionally disturbed by qualifying under at least one of the five categories found in 34 C.F.R. 300.5(b)(8)(i)A-E [the federal regulation on SED].[15]

The court ordered the school district to reimburse the parents for their unilateral placement of their son in a residential facility.

Case Study Four: *Dallas Sch. Dist. v. Richard C.*

The parents of a fifteen-year-old learning disabled student objected to the school district's reclassification of their son as SED.[16] A Comprehensive Evaluation Report conducted by the school district described the student's conduct as follows:

> 1. Leaving the school building when he is asked to change his seat.
> 2. Standing in the corner of the room and pretending to urinate using sound effects and gestures or telling people to step over the puddle on the floor because he just wet his pants.
> 3. Spitting in students' faces or on the floor.
> 4. Asking to use the phone to talk to his dead grandmother who is very sick.
> 5. Standing up and yelling cheers to the class complete with hand motions "you say pencil, I say paper, etc . . .".
> 6. Putting a curse on a student by standing over her with his hands extended over her head calling Satan to curse her.
> 7. Continually singing out in class, Twinkle Little Star, Killing in the name of, I believe in reincarnation and I am coming back as a lion to eat you, rap singing.
> 8. Saying, "I can't wait to become a skin head so I can kill people".

[14] *Lapides v. Cote*, 1987 WL 110178 (N.D. Cal. 1988).

[15] *Id.* at 900.

[16] *Dallas Sch. Dist. v. Richard C.*, 24 IDELR 741 (Pa. Commw. Ct. 1996).

9. Pretending to skateboard and do Kung Fu fighting during class complete with sound effects.
10. Talking and cursing at his shirt.[117]

Hearing Officer Decision

The hearing officer found that the student engaged in serious maladaptive behavior and that he satisfied the statutory criteria for SED. The hearing officer ordered certain changes to the student's Individualized Education Program (IEP) so that the IEP would allow the student to obtain meaningful educational benefits. The changes made provisions for such things as therapy by a psychologist, one-on-one instruction, small staff-to-pupil ratio, a behavioral modification plan, family counseling, and reevaluation.

Hearing Panel Decision

The student's parents filed exceptions with a hearing panel regarding the hearing officer's findings. The hearing panel agreed with the student's parents that he had been improperly classified as SED and found that the student did not meet the regulatory definition of SED. The hearing panel determined the student's disciplinary problems at school were evidence of "maladaptive behavior"[118] that did not warrant SED classification.

Court Decision

The school district appealed the hearing panel's findings to a Pennsylvania Commonwealth Court. The court held that the hearing panel had concluded that the student did not meet the first regulatory characteristic—an inability to learn which cannot be explained by intellectual, sensory or health factors; however, the court also found that the hearing panel failed to consider the remaining four characteristics—any one of which could place a student within the SED classification. The court found that the evidence indicated disciplinary problems, but also indicated that the student was "unable to build or maintain satisfactory interpersonal relationships with peers and teachers, and that the student exhibit[ed] inappropriate behavior under normal circumstances in school."[119] The hearing officer's decision was reinstated since it was determined that the school district had properly classified the student and had offered an appropriate program.

Case Study Five: *Sarah R. v. Independent Sch. Dist. of Boise City*

In Idaho, a hearing officer found that a high school student, whose educational problems became noticeable in the fifth grade, was SED. The student had numerous problems, including substantial problems with at least one teacher a year, a pattern of resistance to attending school, which grew worse,

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[117] *Id.* at 741 (Finding 8).

[118] *Id.* at 744.

[119] *Id.*

deteriorating behaviors at home, drug use to make her feel happy and as a way to make friends, and "significant mental and emotional development problems, which were of sufficient magnitude to result in the school and educational problems she encountered."[10]

This case is presently on appeal to the U.S. District Court in Idaho on several issues, including whether the hearing officer improperly identified the student as SED. Although this case involves an Idaho school district, it does not currently have precedence; however, the decision of the U.S. District Court will have precedence.

"Chad has undeniably had more than his share of tragedy and pain, beginning at a very early age. However, this does not make hanging out of a third story window by a bedsheet, or cutting off the tip of his finger with a hatchet upon hearing of the death of a former friend's father, normal responses under the circumstances."

—U.S. District Court in California
Lapides v. Lyon

[10] *Sarah W. v. Independent Sch. Dist. of Boise Cty.*, 19 unpublished decision, 18 A.L.E. Feb. 14 1991) (before the Idaho State Department of Education, State of Idaho, Findings of Fact, Conclusions of Law and Decision).

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XI. FIVE CASE STUDIES: Behavior/emotional problems held *not to be* SED

Case Study One: *A.E. Evans v. Independent Sch. Dist. No. 11*

A student with a learning disability in math also experienced problems with peer interaction, impulse control, and excessive anxiety while in school.[1] The student was suspended from school for theft, fighting, tardiness, smoking, disruptions of class, and use of improper language. The behavior problems were found to be unrelated to the student's disability. Upon hearing that she was suspended, the student made a suicidal gesture by cutting herself on the arm with a broken bottle.

The student was admitted to a psychiatric unit and was diagnosed as having a conduct disorder related to emotional problems and a borderline personality disorder.

The issue reviewed by the Tenth U.S. Circuit Court of Appeals was "whether seriously emotionally disturbed children who are diagnosed as having a conduct disorder are properly excluded from the coverage of Public Law 94-142 [IDEA] by the language in 34 C.F.R. § 300.5(b)(8) [federal regulations]."[2]

The court found that the evidence presented supported the finding that, while the student suffered from a conduct disorder, she was not SED within the federal definition.

Case Study Two: *Doe v. Bd. of Educ. of the State of Connecticut*

Beginning in the sixth grade, a student emotionally deteriorated to the extent that his parents hospitalized him.[3] A social worker described the student "as a 'male with angry sullen mood who refuses to cooperate with examiner. Externalizes blame for difficulties. Insight and judgement believed significantly impaired at this time.'"[4] The student was found to exhibit many characteristics of depression. Teacher comments indicated that, at times, the student was "provocative, argumentative, distracted, uncooperative, and made self-deprecating comments."[5]

The court found that the student was not a student with a disability in need of special education. His academic performance before, during, and after his hospitalization was at least satisfactory, and his behavior was generally appropriate. Therefore, the student's

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[1] *A.E. v. Independent Sch. Dist. No. 11*, 936 F.2d 472, 17 IDELR 950, 951 (10th Cir. 1991).

[2] *Doe v. Bd. of Educ. of the State of Connecticut*, 17 IDELR 1 (D. Conn. 1991).

[3] *Id.* at 30.

[4] *Id.* at 40.

education was found to be not significantly impeded or adversely affected by his behavior problems.

Case Study Three: *Doe v. Superior Court High Sch. Dist.*

A student placed at a private special education program by her parents for a variety of reasons — numerous truancies, stayed in her room all the time, difficulties getting along with others, deteriorating grades — was found by a U.S. District Court to be "socially maladjusted" rather than SED.[46]

At the administrative hearing, testimony was heard regarding the student's use of drugs and alcohol, as well as her involvement in a punk subculture. Although the student was dysfunctional because of her use of drugs, she did not exhibit signs of true clinical depression.

Several teachers who testified at the hearing stated that the student would have passed the various classes, or received a higher grade, if she had done her homework and turned in assigned work.

The court, in reversing the hearing officer's finding that the student was SED, found that the student "was totally capable of taking advantage of a regular education program were she, in fact, sober and not on drugs and attending school on a regular basis."[47] The court further held that "whatever conditions the plaintiff [student] was suffering from that it clearly was not the cause of her doing poorly in school, but the cause of this was primarily truancy, abuse of drugs, and boredom with some classes."[48]

Case Study Four: *In re Erickson Elementary S.*

The parent of a student who was belligerent, depressed, and generally uncontrollable at home sought reimbursement for costs associated with the assessment and special education of her daughter.[49] The mother had unilaterally placed her daughter in a private boarding school after she was suspended from school for disciplinary problems. The mother's written description of her daughter's behavior stated:

> Her negative attitude toward school has held her back. She is disruptive to all classmates as well as teachers. She has been suspended from all schools in the Bellevue School District for the remainder of the 1988-89 school year. She was arrested by the Bellevue Police Department for theft. Kevin is extremely temperamental (sic) and shows her likes and dislikes for specific teachers. She is liked by students and faculty for her friendliness. She will not

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[46] *Doe v. Superior Court High Sch. Dist.*, 1987-88 EHLR ¶ 558:111, 114 (C.D. Cal. 1987).

[47] *Id.* at 113.

[48] *Id.*

[49] *In re Erickson Elementary S.*, 1988-89 EHLR 561:280 (Wash. 1989).

speak to me (Her Mother) unless she has to (does not volunteer) and displays erratic behavior toward adults as a whole. Kristi has only one sister. She confides in her sporadically, but displays jealousy and anger toward her most of the time. (Kristi's) manners not to participate in the family setting in any way. She locks herself in her room and is constantly on the phone with her friends. She is not eating well, not taking good care of herself. Kristi feels extremely threatened by the family setting, as if she is not good enough, not getting what she wants. She is confused about herself. Her negative attitude toward life and herself are creating a need for acceptance from her peers, and not the family setting. Kristi has three close friends, all of whom are constantly "in trouble" with the law or their parents. She has a multitude of friends whom she does not reveal. The activities they pursue are various, most of which are illegal or immoral."[10]

At the due process hearing the assistant principal, Ms. Savory, testified that she had a good relationship with Kristi and that she had not observed the extreme behaviors identified by the mother. The assistant principal also testified that she had notified the mother that Kristi was likely involved in drugs, based upon her observations of a shift in Kristi's appearance and attitude:

> Ms. Savory initially characterized Kristi as "alert, perky, and dressed neatly but was not attending school as full" but later noted that her appearance changed "to being more lethargic, less tidy, and wearing heavy eye make-up . . . a change in friendship associations (which) caused (Ms. Savory) to alert the mother that she was most likely drug involved on a daily basis." Ms. Savory believes Kristi demonstrated a willingness and an ability to reason and make choices. She believes Kristi was deliberately engaging in poor school performance to manipulate her mother into placing her at another school."[11]

The Washington state statute dealing with SED provided that a student's evaluation must distinguish between common disciplinary problem behaviors and serious behavioral disabilities.

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[10] *Id.* at 336.

[11] *Id.* at 337.

"Common disciplinary problems (e.g., truancy, smoking, breaking school conduct rules) may exist in conjunction with serious behavioral disabilities, but cannot be used as the sole criterion for representing special education and related services."[77]

The hearing panel held that there was insufficient evidence to establish that the student exhibited any one of the five SED characteristics defined in the federal regulations over a long period of time and to a marked degree which adversely affected her educational performance. Therefore, Kristi was found to be ineligible for special education under the category of SED.

Case Study Five: *Pete Ann Englund S.R. Bee*

The father of a 14 year old student disagreed with a school district's finding that his son was SED.[78] The student had above average to superior intelligence and was eligible for special education based on a learning disability. He also suffered considerable emotional distress as a result of a custody dispute during the divorce of his parents.

The hearing officer reviewed each of the five characteristics listed in the federal regulation to determine whether the student met the definition of SED. While the student had a difficult time making and keeping friends, his relationships with teachers were described in a positive manner. Furthermore, the student was not found to be significantly depressed or unhappy.

Based upon the facts presented, the hearing officer found that the student should not be classified as SED.

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[77] *Id.* at 170.

[78] *Pete Ann Englund S.R. Bee*, 18 EHLR 8 (Wis. DER 1991).

It may assist the educator to break down each part of the regulation discussed in this guide and apply the various definitions to a particular situation.

CONCLUSION

As the *Guide to Identification* makes apparent, determining whether a student qualifies for special education and related services under the SED disability category is not an easy task.

It may assist the educator to break down each part of the regulation discussed in this guide and apply the various definitions to a particular situation. One should not forget that each student must be evaluated on a case-by-case basis. A student may not be determined to be eligible or ineligible for special education and related services because he/she has or does not have a specific disorder or condition.

Because SED as a disability category is such a complex area, the need for documentation is vital. Documentation describing a student's behavior, as well as the actions taken by the school district, will be necessary in those instances where a district's identification, determination, or actions are questioned.